IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA

Civil Writ Petition No.1 of 2001

Date of decision: 15.03.2007

Shameem Begum @ Shameem Akhtar **Petitioner**

Versus

State of H.P. and others **Respondents**

Coram

The Hon'ble Mr.Justice Dev Darshan Sud,J.

Whether approved for reporting ?[1] *yes.*

For the Petitioner: **Mr. Rakesh Jaswal, Advocate.**

For the Respondents: **Mr. Rajan Dewan, Addl. Advocate General.**

Dev Darshan Sud,J.

The petitioner is aggrieved by the order passed by the Financial Commissioner (Appeals) in Revision No.181 of 1999, decided on 30.10.2000, whereby the order of ejectment dated 6.2.1997, passed against the petitioner under Section 163 of the Himachal Pradesh Land Revenue Act, 1954 (hereinafter referred to as 'the Act'), has been held to be legal, valid and in accordance with law.

Brief facts relevant for the decision of the case are that proceedings under Section 163 of the Act were initiated against the petitioner on the report of the Patwari Halqa. It was alleged that the petitioner

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgement***? Yes.

had put a wall around Khasra No.68/1, measuring 0-10-99 hectares and also planted almond and plum plants over some portion of Khasra No.67/1, as also constructed a house over a part of Government land. According to respondents, this land was State Government property and therefore, proceedings under Section 163 of the Act for ejectment were initiated against the petitioner. The Assistant Collector, Ist Grade, Rampur Bushahar, by his order dated 6.2.1997, ordered the ejectment of the petitioner.

A reading of the order shows that it is based on the report of the Patwari Halqua and the Tatima, prepared by Kanungo, Sarahan and there is little or no compliance . The order states that apart from these facts, a number complaints had been received from the villagers, which also formed part of the ejectment proceedings. The order concludes that after going through the reports of Patwari Halqua and Kanungo attached with the file and the documents thereon, the only conclusion is that the petitioner is enacting a drama to assert her possession and has encroached upon Khasra No.68/1, measuring 0-10-99 hectares and Khasra No.67/1 on which construction of a house has been built.

An appeal under Section 14 of the Act was filed before the Sub Divisional Collector, Rampur, which was dismissed on 21.12.1998. A revision under Section 17(2) of the Act filed before the Commissioner, Shimla, met the same fate and ultimately, another revision under Section

17(1) (4) of the Act, was also dismissed by the Financial Commissioner (Appeals).

The main grievance of the petitioner before this Court is that in proceedings under Section 163 of the Act, where there is a question as to title or to adverse possession claimed by an encroacher for a period of thirty years in respect of land from which ejectment is made or is to be made, the question is to be determined by the adjudicating authority as if it were a civil court and he would exercise all powers which are exercisable by a civil court. Sub-section (4) to Section 163 provides that for determination of the question, the Revenue Officer has to follow the same procedure as is applicable to the trial of an original suit by a civil court and the adjudicating officer shall record the judgment and decree containing the particulars required by the Code of Civil Procedure, 1908. Sub-section (5) to Section 163 provides that an appeal from the decree of the Revenue Court made under sub-section (4) shall lie to the District Judge as if that decree were a decree of a Subordinate Judge in an original suit and further appeal from the appellate decree of a District Judge shall lie to the High Court if the case involves substantial question of law. The relevant provisions are:-

> "(3) When there is a question as to title or to the adverse possession, wherein the possession is claimed by an encroacher for a period beyond thirty years in relation to the land from which ejectment is made or is to be made under this Section, the Revenue

> Officer, not below the rank of an Assistant Collector of the First Grade, (may proceed) to determine the question, as if he, were a Civil Court and shall exercise all such powers as are exercisable by a Civil Court.
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> (4) For the determination of the question under sub-section (3), the Revenue Officer shall follow the same procedure as is applicable to the trial of an original suit by a Civil Court, and he shall record a judgment and decree containing the particulars required by the Code of Civil Procedure, 1908 to be specified therein.
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> (5) An appeal from the decree of the Revenue Court made under sub-section (4) shall lie to the District Judge as if that decree were a decree of a Subordinate Judge in an original suit.
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> (6) A further appeal from the appellate decree of a District Judge upon an appeal under sub-section (5), shall lie to the High Court only if the High Court is satisfied that a substantial question of law is involved."

These provisions were added by the H.P. Land Revenue (Amendment) Act 15 of 1989, as a sequel to the decision rendered by this Court in ***Kaka Ram alias Ram Lal*** Vs. ***Financial Commissioner, Himachal Pradesh and others***, ***AIR 1985 H.P. 21***, wherein this Court had held that the appropriate course for revenue authorities in case where of encroachment on Government land is found and where question of title is raised, is not to decide such cases during mutation proceedings, but to refer the matter to civil court where question of title can be determined. Accordingly, Sections 163(3) to 163(6) were inserted by the H.P. Land Revenue (Amendment) Act 15 of 1989.

Before I discuss merits of the case, one point needs to be noticed and that is, orders under Section 163(3) are appealable and the question regarding maintainability of the writ petition would arise. This objection, though not taken in the reply, was urged by the learned counsel appearing for the State. At this stage, after a period of more than five years after the writ petition has been admitted, the question of an alternate remedy provided by the statute as being a bar to the writ petition, cannot be considered. Even where such remedy is available, it would not be fair to refuse relief to the petitioner on this ground. ***(See:L. Hirday Narain vs. Income-Tax Officer, Bareilly AIR 1971 Supreme Court 33 (V 58 C 4), [Batuk Nath Bhattacharjee Vs. GGT, (1996) 217 ITR 434, 451 (Cal)], Smt. Shantidevi Vs. ITO, (1996) 217 ITR 776, 779 (MP), [Walliawarum Plantations Vs. AgIT & STO, (1999) 273 ITR 325, 331 (Ker)], Kalinga Cement Ltd. Vs. Union of India, (1995) 79 ELT 5, 8-9 (Ori); Plethico Pharmaceutical Vs. Union of India, (1995) 80 ELT 755, 758 (Bom).]***

Further, the proceedings which have been conducted by the respondents are *ultra-vires* of Section 163 of the Act and alternate remedy would not be a bar the petitioner from filing the present writ petition.

Learned counsel for the petitioner has submitted that the authorities have ordered the ejectment of the petitioner without recording any evidence and the documents in the nature of Tatima, inquiry report and

demarcation etc. have not been proved in accordance with law. The opportunity to cross examine these witnesses was not granted. According to learned counsel, since the mandatory provisions Section 163 of the Act have not been followed, it was neither possible nor feasible to have filed an appeal before the Ld. District Judge.

I have heard learned counsel for the parties and have gone through the record. I find that there is merit in the submission of the learned counsel for the petitioner. None of the orders records (nor any record shown to me) that the case has been tried as if it were a civil suit. The provisions of Section 163 are mandatory. Whenever a claim of adverse possession etc., as contemplated under Section 163(3) is made, the Revenue Officer is required to determine such question as if it were a civil court by following the procedure as required for determination of questions in an original suit. This is the mandate of the law and there is no provision which allows deviation. The proceedings cannot be converted into summary proceedings. Recording of evidence and proof of documents is a mandatory requirement. Without adhering to these mandatory requirements, any order which is passed, would be *ultra-vires* of the provisions of Section 163 of the Act and cannot be sustained in law.

The orders which have been passed in revision and appeal only show that the revenue authorities, before whom the case had been argued, were only too anxious to sustain the initial order of ejectment. No person has

any right to make encroachment on any part of Government land or to appropriate Government property. However, it is also important that the procedure established by law must be followed before any orders for ejectment are passed. The determination of the question can not be left to the discretion of an individual officer but by a adherence to the statute prescribing the necessary conditions. Mere incantation of the words like "carefully considered the record " and "have gone through the record" are not sufficient compliance to the principles of natural justice and in this case the mandatory requirements of Section 163.

A reading of the orders Annexures P-2 to P-5, would show that every officer deciding the appeal/revision has acted with a pre-determined mind to sustain the order of ejectment. The use of words like "carefully considered the record" and "have gone through the record" are not sufficient compliance of the principles of natural justice or the mandatory requirements of Section 163 of the Act without any material on the record to substantiate or justify the conclusion arrived at after consideration.

The question regarding applicability of Section 163(3) of the Act was urged before the Sub Divisional Collector, who noticed the same but rejected the contention on the ground that opportunity was given to the petitioner to lead evidence. The case has proceeded by accepting the reports of the Revenue

Officer(s), tatima, and the purported complaints made against the petitioner without testing their veracity by cross-examination. It is not clear that such documents or statements were proved in accordance with law. To say the least, the officer seized of the matter should decide the same in accordance with law which in the present case was contained in Section 163(3)to(6). Once the procedure of a Civil Suit is to be adopted on the documents or statement must be proved in accordance with law and cannot be accepted without proof.

The orders passed by the Commissioner and the Financial Commissioner are non speaking orders. Since they do not contain reason but only conclusions.

The provisions of Section 163 are mandatory in nature and ejectment proceedings have to be conducted as if it were a trial on the original side for which purpose provisions of the Code of Civil Procedure would apply including drawing up a decree. From the record, I find that no decree has been drawn up.

Cumulatively, the circumstances on the record show that the respondents have erred in accepting the report of etc. submitted by the Patwari and Kanungo, without proof and without cross examination of the witnesses etc. . The order of the Assistant Collector also shows that he has taken into consideration some complaints made by some villagers. The entire material placed on record has not been proved in accordance with law nor any opportunity given to the petitioner to cross-

examine the persons making statements in order to test the veracity of the statements or the documents used as evidence against the petitioner.

The learned Additional Advocate General has drawn my attention to judgment dated 25.10.2000 titled **Amar Chand Chauhan** Vs. **State of H.P**. passed by this Court in CWP No.808 of 2000. It was submitted that the ratio of the judgment squarely covers the present case and encroachment of Govt. land cannot be allowed. However, while ordering ejectment, the principle of natural justice and statutory mandates have to be observed. In the case relied upon, there was no plea regarding adverse possession. This Court held:-

> *"We see consideration force in the submission of the Advocate General. In our opinion, no plea was put forward regarding title or (sic) adverse possession by the petitioner before the first authority and the finding was recorded on merits that the petitioner was not in possession since long. Such a finding can be said to be a finding of fact. When the said finding has been confirmed in appeal, in revision as well as in further appeal, this court would, obviously, not interfere with such a pure finding of fact. In these circumstances, we see no reason to interfere with the orders passed by the authorities below. The petition deserves to be dismissed and is, accordingly, dismissed. Notice is discharged. No costs."*

In the present case, I do not find any such exercise having been undertaken rather the order passed by the Collector is not in conformity with the provisions of law. If the authorities were so keen protecting encroachment of Govt. land, the proper course of action would have been to follow the statutory provisions of

Section 163. The findings are not in accordance with law and the orders in revision and appeal as observed by me are non speaking orders. As observed by me, no record has been produced to show that there was such compliance. On the question of applicability of the precedent there is no dispute at all. The judgment of the Hon'ble Supreme Court in **State of Rajasthan** v. **Harphool** Singh (dead) through his LRs, **{(2000) 5 SCC 652**, is of no help to the respondent.

For the reasons stated above, I hold that the order of ejectment (Annexure P-1) passed against the petitioner is illegal and without jurisdiction and it is quashed accordingly. All subsequent proceedings in the nature of appellate and revisional orders are also quashed. The respondents, however, are free to initiate proceedings in accordance with law against the petitioner if the circumstances so warrant. There shall be no order as to costs.

March 15, 2007 **(Dev Darshan Sud)**
(ss) **Judge**